Tan Kim Chuan & Anor v Chandu Nair

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-533-1989
ABDUL HAMID OMAR LP, GUNN CHIT TUAN AND JEMURI SERJAN SCJJ
25 JANUARY 1991

Damages (Personal Injury or Death) — Prospective loss of future earnings — Loss of earning capacity — Plaintiff a minor and student not earning anything — Civil Law Act 1956, s 28A(c)

In this case the plaintiff-respondent was 12 years old when he was injured in a road accident. He was then a student and not earning anything. He claimed damages for his injuries and the learned judge awarded him a sum of $67,200 as general damages for prospective loss of future earnings. The appellants against whom the award was made appealed. It was argued that s 28A(2)(c)(i) and (ii) of the Civil Law Act 1956 precluded and barred the making in this case of an award in general damages for prospective loss of future earnings or loss of earning capacity.

Held, allowing the appeal:
It is abundantly clear that the legislature in enacting s 28A(2)(c) of the Civil Law Act 1956, has decided that an injured person ought not to get any damages either for loss of future earnings or loss of earning capacity unless before the accident (at the date of the accident) he was in fact receiving earnings. The award for loss of earning capacity in this case must be quashed.

[Bahasa Malaysia summary

Di dalam kes ini plaintiff-responden berumur 12 tahun apabila ia mengalami kecederaan di dalam kemalangan jalan raya. Pada masa itu ia murid sekolah dan belum mempunyai pendapatan. Ia telah menuntut gantirugi bagi kecederaannya dan hakim yang arif telah memberi jumlah $67,200 sebagai ganti rugi am untuk bakal kehilangan mata pencarian. Perayu terhadap siapa perintah itu dibuat telah merayu. Telah dihujahkan bahawa s 28A(2)(c)(i) and (ii) Akta Undang-Undang Sivil 1956, menghalang dan mengalang perintah dibuat di dalam kes ini untuk memberi ganti rugi am bagi bakal kehilangan mata pencarian atau kehilangan keupayaan mendapat mata pencarian.

Diputuskan, membenarkan rayuan itu:
Adalah sangat jelas bahawa badan perundangan dengan memperuntukkan s 28A(2)(c) Akta Undang-Undang Sivil 1956 itu, telah memutuskan bahawa seorang yang tercedera tidak boleh mendapat ganti rugi untuk kehilangan mata pencarian atau kehilangan keupayaan mendapat mata pencarian kecuali jika sebelum kemalangan itu (pada masa kemalangan itu) ia telahpun memperolehi mata pencarian. Award untuk kehilangan keupayaan mendapat mata pencarian hendaklah dibatalkan.]

Cases referred to
1 *Spillers Ltd* v *Cardiff (Borough) Assessment Committee and Pritchard* [1931] 2 KB 21 (refd)
2 *Fairley* v *John Thompson Ltd* [1973] 2 Lloyds Rep 40 (refd)
3 *Tay Tong Chew & Anor* v *Abdul Rahman bin Haji Ahmad* [1985] 1 MLJ 50 (refd)
4 *Ti Huck & Anor* v *Mohamed Yusof* [1973] 2 MLJ 62 (refd)
5 *Ngooi Ku Siong* v *Aidi Abdullah* [1985] 1 MLJ 30 (refd)
6 *Mohamed Syedol Ariffin* v *Yeoh Ooi Gark* [1916] 2 AC 575 (refd)
7 *Jamil bin Harun* v *Yang Kamsiah & Anor* [1984] 1 MLJ 217 (refd)
8 *Seaford Court Estates* v *Asher* [1949] 2 KB 481 (refd)
9 *Magor & St Mellons RDC* v *Newport Corp* [1952] AC 189 (refd)
10 *United Hokkien Cemeteries Penang* v *Majlis Perbandaran Pulau Pinang* [1979] 2 MLJ 121 (refd)
11 *Foo Loke Ying & Anor* v *Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35 (refd)
12 *Vengadasalam* v *Khor Soon Weng & Ors* [1985] 2 MLJ 449 (refd)
13 *Yang Yap Fong & Anor* v *Leong Pek Hoon & Anor* [1987] 1 CLJ 377 (not folld)
14 *Dirkje Peiternella Halma* v *Mohd Noor bin Baharom & Ors* [1990] 3 MLJ 103 (distd)

Legislation referred to
Civil Law Act 1956 ss 3, 5, 28

Appeal from: Guaman Mahkamah Tinggi Temerloh No P25-1954-86 (High Court, Temerloh)

G Sri Ram (CS Kumar with him) for the appellants.
Manjeet Singh Dhillon for the respondent.

Cur Adv Vult

Abdul Hamid Omar LP (delivering the judgment of the court): This is an appeal against the decision of the High Court Temerloh relating to a claim arising from an accident on 13 May 1985 causing injuries and damages to the plaintiff/respondent. This appeal is against the quantum of damages as the original appeal against the apportionment of liability was abandoned at the outset of the hearing. The facts are not in dispute. The plaintiff was 12 years old at the material time of the accident and was a student not earning anything. The grounds of appeal as contained in the memorandum are reproduced below:

> (4) The learned trial judge erred in law and in fact in awarding the respondent a sum of $67,200 as general damages for prospective loss of future earnings.
>
> (5) The learned trial judge ought to have held that s 28A(2)(c)(i) and (ii) of the Civil Law Act 1956 ('the Act') precluded and/or barred the making of an award in general damages for prospective loss of future earnings and/or reduced earning capacity and/or loss of earning capacity on the grounds that
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> (a) the respondent was not receiving earnings by his own labour;
> (b) neither was he engaged in gainful activity;
> (c) the respondent was at the time of injury an unemployed school-going infant; and
> (d) the legislative intent and purpose of the amendments to the Act was to bar speculative and large awards in situations involving unemployed individuals and/or infants.

The crucial question raised before us is whether the plaintiff is eligible, as a pure question of law, for any award for loss of his earning capacity in consequence of the accident. Coming straight to a consideration of this

basic issue, we feel that the answer to this question mainly depends on the interpretation of the Civil Law Act 1956 (Act 67) as amended in 1984.

At the outset we bear in mind when a matter of statutory interpretation is involved what Lord Hewart CJ said in *Spillers Ltd* v *Cardiff (Borough) Assessment Committee and Pritchard*[1] at p 43:

> It ought to be the rule and we are glad to think it is the rule that words are used in an Act of Parliament correctly and exactly and not loosely and inexactly. Upon those who assert that the rule has been broken, the burden of establishing their proposition lies heavily, and they can discharge it only by pointing something in the context which goes to show that the loose and inexact meaning is to be preferred.

To the above we wish to add that for the words 'in a statute' to be construed effectively reference must be made to their context.

The amended s 28A(2)(c) states that:

> in awarding damages for loss of future earnings the Court shall take into account:
>
> (i) . . . and in any other case, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured.

The question that emerges is whether this amendment forbids award for loss of earning capacity in this case.

Under the common law and pre-1984 statutory law, there was a difference in law between the loss of earnings and loss of earning capacity. This is explained by Lord Denning in *Fairley* v *John Thompson Ltd*[2] at p 42:

> It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.

To illustrate, Lord Denning said 'a manual worker may be incapacitated for manual work, but after the accident he may learn a clerical trade. At his new trade he may actually earn more than he would have done before.' (See the Federal Court decision in *Tay Tong Chew & Anor* v *Abdul Rahman bin Haji Ahmad*;[3] *Ti Huck & Anor* v *Mohamed Yusof*;[4] *Ngooi Ku Siong* v *Aidi Abdullah*;[5] all these cases are pre-amendment cases.)

It may be argued that such distinction is subtle and is only applicable for legal purposes of assessing an award for damages. However, where the award itself is unauthorized by statutory law, its distinction is of no consequence. For practical purposes, it is immaterial whether damages is termed as 'loss of earnings' or 'loss of earning capacity'. Be that as it may, for the purpose of the decision in this case, we do not wish to dwell more on the traditional heads of damages loss of earnings and loss of earning capacity.

The cardinal issue for us to decide is did the 1984 amendments oust the discretion and powers and past practices of the court based primarily on common law. If we hold that the amendments clearly superceded the common law and previous statutory law, then the plaintiff is not entitled to any compensation either for loss of earnings or earning capacity as he was not earning anything at the material time of the accident.

It would be the function of this court to interpret the statutes where there is a lacuna or an area of ambiguity. We need only interpret the law if the intention of the legislature is not clear. This time honoured judicial trend has never been questioned by any authority and therefore before we exercise our power to interpret we must be convinced that the words to be interpreted are loose or inexact. As the point raised is of vital importance in future cases, we have given considerable attention to this point to do justice to the parties.

In the process of inquiry we came across some decisions touching on reception of English law locally. In a Privy Council decision in the case of *Mahomed Syedol Ariffin* v *Yeoh Ooi Gark*,[6] Lord Shaw stated 'the the acceptance of a rule or principle adopted in or derived from English law is not permissible if thereby the true and actual meaning of the statute under construction is varied or denied effect.' If such was the attitude then, the same principles should be more rigidly applicable now in view of the sovereignty and the abolition of appeals to the Privy Council. In another Privy Council case *Jamil bin Harun* v *Yang Kamsiah & Anor*,[7] it was held:

> (1) It is for the courts in Malaysia to decide, subject always to the statute law of the Federation, whether to follow English law. Modern English authorities may be persuasive, but are not binding. In determining whether to accept their guidance the courts will have regard to the circumstances of the states of Malaysia and will be careful to apply them only to the extent that the written law permits and no further than in their view it is just to do so.

We hasten to add that we are conscious that there are two schools of thought relating to statutory interpretation. Lord Denning favoured a creative role for judges, taking on themselves the task of ascertaining the purpose of an act and the ironing out of creases which may appear. Lord Denning has observed in *Seaford Court Estates Ltd* v *Asher*[8] at p 499 that:

> it would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set out to work on the constructive task of finding the

> intention of Parliament and he must do this not only from the language of the statute, but also from a consideration of the social conditions which give rise to it and of the mischief which it was passed to remedy and then he must supplement the written word so as to give 'force and life' to the intention of the legislature.

The other school, notably Lord Simonds, did not share Lord Denning's approach and argued against such a creative role preferring to leave all aspects of the legislative function to Parliament, 'if a gap is disclosed, the remedy lies in an amending Act (*Magor & St Mellons RDC* v *Newport Corp*[9]).

In the same case Lord Morton of Henryton remarked that:

> In so far as the intention of Parliament or of ministers is revealed in Acts of Parliament or Orders, either by the language used or by necessary implication, the courts should, of course, carry these intentions out; but it is not the function of any judge to fill in what he conceives to be the gaps in an Act of Parliament. If he does so, he is usurping the function of the Legislature.

While we respect both schools, we do not really have to prefer any of these opinions. We also need not dwell much on various rules and aids to construction of statutes except to say, in general, that we have always been inclined to follow purposive and literal constructions which means that the literal meaning of an Act will be followed where that meaning is in accordance with the legislative purpose. (See the decision in *United Hokkien Cemetries Penang* v *Majlis Perbandaran Pulau Pinang*;[10] *Foo Loke Ying & Anor* v *Television Broadcasts Ltd & Ors*;[11] *Vengadasalam* v *Khor Soon Weng & Ors.*[12])

For the purpose of the present case, let us examine whether the meaning of the words in the relevant amended Act is very clear whatever canons of construction we apply.

The marginal note to s 28A which reads 'Damages in respect of personal injuries' suggests that the provisions are exhaustive and mandatory. The word 'shall' in the opening sentence in para (c) and the words 'shall not be awarded' in sub-para (i) of para (c) and the words 'shall not take into account' in sub-para (ii) of para (c) in sub-s (2) of s 28A clearly indicate that it is an essential prerequisite that in awarding damages for loss of future earnings or loss of earning capacity there must be proof that the claimant was receiving earnings by his own labour or other gainful activity before he was injured. Even in a case where the plaintiff was receiving earnings before he was injured, the provisions make it clear that a court shall not take into account any prospect of such earnings being increased at some time in the future.

The other argument presented before us for the respondent in this appeal is that the Act did not intend to deprive the claimant of the loss of earning capacity. We feel that such an interpretation is not supported at all by the language of s 28A itself. We reiterate that s 28A(2)(c)(ii) which states that 'only the amount relating to his earnings as aforesaid at the time when he was injured and the court shall not take into account any prospect of earnings aforesaid being increased at sometime in the future', makes the intention of the legislature abundantly clear and indeed the legislature had the prospect of future earnings (whatever be the label attached to it) in mind when the law was enacted.

We need not rely on English authorities to decide this case. In our view much significance must be attached to the fact that our amending Act is not in pari materia with English legislation. More importantly our legislature has clearly exercised its own sovereign and independent mind in effecting the amendments to suit economy and special conditions unique to us.

It is abundantly clear that the legislature, in its own wisdom, decided that an injured person ought not to get any damages in a claim either for loss of future earnings or loss of earning capacity unless before the accident (at the date of accident) he was in fact receiving earnings. To hold otherwise would mean that the court is creating law to provide for something which clearly the legislature has no intention to do. We feel that our legislature has enacted exhaustively and exclusively. The continued validity of the common law concept governing the future earnings of injured people in contrast to amended provisions in accident cases such as the present are inconsistent with each other and cannot co-exist.

The common law notions and our legislative amendments regarding future earnings are so repugnant to each other that a repeal of common law is implied. Sections 3 and 5 of the Civil Law Act 1956 states, among other things, that in West Malaysia common law as administered in England as on 7 April 1956, is only applicable to any other written law, in which category the 1984 amendment falls.

It is to be observed that in the case of *Yang Yap Fong & Anor* v *Leong Pek Hoon & Anor*,[13] the Supreme Court in 1987 had granted compensation for loss of earning capacity to a 13-year old plaintiff. We feel that the earlier tribunal did not have the opportunity to be addressed the full effect of legislation overlapping existing law. The recent case of *Dirkje Peiternella Halma* v *Mohd Noor bin Baharom & Ors*,[14] which was heard by another panel of this court and awarded the plaintiff a sum of $200,000 for loss of earning capacity, can be distinguished from the present case because in that case there was evidence that the plaintiff was earning $1,270 per month before she came to this country for a holiday and was knocked down by a bus. In that case, there was evidence to show that she had suffered a loss of earning capacity.

In the light of all the above circumstances, we are unable to agree with the decision of the learned judge. We accordingly allow the appeal and vary the judgment, quashing the award for loss of earning capacity for $67,200 in this case with interest. We also award half costs of this appeal to the appellants. Deposit is refunded.

Appeal allowed.

Solicitors: *Tung & Kumar; Manjeet Singh Dhillon.*

Reported by *Prof Ahmad Ibrahim*

[This Supreme Court judgment was first reported in the original text in Bahasa Malaysia — see *Dewan Bandaraya Kuala Lumpur* v *Suppiah* [1991] 1 MLJ 149. The judgment was translated by the MLJ and is not therefore the official translation.]

Dewan Bandaraya Kuala Lumpur v Suppiah

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-234-1990
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF AND AJAIB SINGH SCJJ
1 DECEMBER 1990

Local Government — Payment of rates — Sale of rateable holding — Notice of change of ownership not given to the City Council and sale or transfer not recorded in the books of the local authority — Rates to be first charge — Who is liable for payment of rates — Whether goods of the purchaser can be attached — Local Government Act 1976, ss 146, 148 & 160

The respondent in this case purchased a piece of land in Kuala Lumpur on 6 August 1986 and the transfer was registered on 28 October 1986. However, the notice of the transfer was not given by the purchaser or the sellers to the City Council, Kuala Lumpur, within three months of the sale or transfer. The sellers had agreed to pay all rates due up to the completion of the sale, ie 6 August 1986. As the rates were not paid, the City Council by notice dated 15 December 1986 asked the sellers to pay the rates due amounting to $973. As the payment was not made, the City Council sent a letter to the respondent asking for payment. The respondent did not pay the amount claimed but his solicitors replied stating that the transfer had been registered on 28 October 1986 and that he had paid the amount of the rates amounting to $132 for the period up to December 1986. He also sent a cheque for $264 in payment of the rates for 1987. The City Council replied to the letter confirming receipt of the rates of $264 for which it issued its receipt. It stressed in its letter that under s 160(5) of the Local Government Act 1976 the buyer was still liable for payment of the arrears of the rates for the period before his purchase of the property. Subsequently the City Council attached the goods of the respondent. The respondent applied to the magistrate for the release of the goods and when this was refused he appealed to the High Court. The learned judge of the High Court allowed the appeal (see *Suppiah* v *Dewan Bandaraya Kuala Lumpur* [1990] 2 MLJ 44). The City Council appealed to the Supreme Court.

Held, dismissing the appeal:

(1) Section 160(4) and s 160(5) of the Local Government Act 1976 should be construed together. Section 160(4) provides that every person who sells or transfers a rateable holding shall continue to be liable to pay all rates payable before the notice of the transfer has been given or until the sale or transfer has been recorded in the books of the local authority. In this case the notice of transfer had not been given and neither is there evidence that the sale or transfer had been recorded in the books of the local authority. The sellers therefore remained liable for the payment of the rates following the notice sent to them.

(2) On the facts of this case, the City Council cannot rely on s 160(5) of the Act as a basis for attaching the property of the respondent as it is not likely that the Act would require both parties to make the one and same payment.

(3) The interpretation of both s 160(4) and (5) of the Act should be based on the liability already imposed, that is the liability imposed by s 160(4) on the seller unless the notice required under s 160(1) has been given. The duty of giving the notice is placed by law on both the seller and the purchaser. It is clear that the Act has placed the burden of paying the rates on the owners of holdings and not on the occupiers, as in England.

Cases referred to

1 *Lee Wah Bank Ltd v The Commissioner of Federal Capital of Kuala Lumpur* [1962] 1 MLJ 23 (folld)
2 *Home Luck Investments Sdn Bhd* v *Commissioner of Federal Capital of Kuala Lumpur* [1969] 1 MLJ 248 (folld)

Legislation referred to

Local Government Act 1976 ss 146, 148, 160

Appeal from: High Court Civil Appeal No R8-11-128 of 1988 (High Court, Kuala Lumpur)

S Krishna Aiyer for the appellant.
Dato' G Vadiveloo for the respondent.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): Suppiah s/o Govindasamy (the respondent) applied to the magistrate, Kuala Lumpur, for the City Council, Kuala Lumpur, to release his goods which had been attached under s 148 of the Local Government Act 1976. The magistrate dismissed the respondent's application and the respondent appealed to the judge of the High Court, Kuala Lumpur (See [1990] 3 MLJ 44). Now the City Council, Kuala Lumpur, has appealed against the decision of the judge of the High Court, Kuala Lumpur, after he allowed the respondent's appeal. After hearing the submissions, we dismissed the appeal and now give our reasons for doing so.

In order to better understand the dispute in this appeal, it is necessary to describe the background facts and the relevant statutory provisions. The relevant statutory provisions in the Local Government Act 1976 are as follows: